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Supreme Court of the United States

OCTOBER TERM, 1950

No. 275

ARTHUR BROWN,
Petitioner,

v.

EASTERN STATES CORPORATION, ET AL.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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September 22, 1950.

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EASTERN STATES CORPORATION, *et al.*,

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

Statement

This was a suit originally brought by petitioner in the Circuit Court No. 2 of Baltimore, Maryland. As the holder of shares of the preferred and common stock of respondent Eastern States Corporation, petitioner alleged that a written offer or plan, dated August 30, 1949, under which until the close of business on September 30, 1949, holders of the Corporation's preferred stock might voluntarily tender their shares for purchase and retirement by the Corporation, was misleading, unfair and in violation of federal statutes.* The allegations involved claims of liability under the Investment Company Act of 1940 (15

* The offer was filed with the Securities and Exchange Commission in accordance with the provisions of the Investment Company Act of 1940 and a registration statement with respect to the securities to be issued pursuant to the offer was also filed with that Commission pursuant to the provisions of the Securities Act of 1933. After careful review of the offer and of the registration statement, the Commission made an order permitting the registration statement to become effective (see *infra*, p. 14).

U.S.C.A. Sec. 80a-33(b)) and, possibly, under the Securities Act of 1933 (15 U.S.C.A. Secs. 77 k and l). Petitioner secured an *ex parte* restraining order from the State Court enjoining the carrying out of the plan until the further order of that Court (34a).*

The suit constituted a claim arising under a law of the United States which was removable to the federal court and the respondent Corporation removed the action to the United States District Court for the District of Maryland (28 U.S.C.A. Sec. 1441(b)). That Court denied petitioner's motion to remand and, after a full hearing, granted the respondent Corporation's motion to vacate the *ex parte* restraining order (87a, 88a). The order was entered September 26, 1949. Respondent Corporation then carried out the plan and before the expiration date (September 30), accepted tenders of approximately 27% of its outstanding preferred stock (110a). Eventually, after answer and further hearing, on October 7, 1949 the District Court entered an order dismissing the action on the ground that all of the issues had been determined and that the action had become moot (92a, 110a). Petitioner appealed from both orders, but without obtaining any stays thereof pending the appeal.

Respondents moved in the Court of Appeals to dismiss the appeals as moot, but the Court denied the motion and after hearing the appeals affirmed the order of the District Court dismissing the action without prejudice (337).

Petitioner also applied below for a rehearing of the

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* Throughout this brief numbers in parentheses, except as otherwise indicated, refer to pages of the Appendices to Appellant's and Appellees' Briefs in the Court of Appeals and the Proceedings in the Court of Appeals. The pages of Appellees' Appendix run from 1a to 131a, Appellant's Appendix from 133a to 198a, and the Proceedings in the Court of Appeals from 299 to 346.

appeals and by an order entered May 19, 1950 the Court of Appeals denied such application on the grounds that the petition was filed too late and that it was without merit (345).

The principal ground on which petitioner requests review by this Court is that the Court of Appeals affirmed an order of the District Court denying petitioner's motion to remand the case to the State Court after the filing of an amended bill of complaint in the District Court which petitioner claims eliminated the federal question. That claim, as we shall later show, is not well founded—the federal question remained after the amendment.

Summary of Argument

The petition for certiorari should be denied:

(1) The case is and has been moot since early in October 1949, when all transactions under the proposal for tender of preferred stocks of respondent Eastern States Corporation were completed.

(2) The District Court properly denied petitioner's motion to remand because (a) the cause was not improvidently removed, (b) as a case involving a federal question under the Investment Company Act of 1940, Sec. 80a-33(b), it was one over which the District Court had competent jurisdiction, and (c) assuming *arguendo* that the amended complaint eliminated the federal question (which respondents do not concede), under the statute regulating remand after removal (28 U.S.C.A., 1950 edition, Sec. 1447(c)), the amendment of the complaint in the District Court pursuant to the Federal Rules of Civil Procedure did not destroy federal jurisdiction which had been established by the allegations of the original complaint (*Pullman Co.* v. *Jenkins,* 305 U. S. 534, 537 (1939);

St. Paul Indemnity Co. v. *Red Cab Co.*, 303 U. S. 283 (1938); *Daland* v. *Hewitt Soap Co.*, 27 F. Supp. 482 (S.D.N.Y., 1939), opinion by Patterson, J.).

(3) The amended complaint did not eliminate the federal question.

POINT I

The case is moot because all of the transactions were completed shortly after September 30, 1949.

The most compelling reason for the denial of the petition for certiorari is that the case now is and since October 1949 has been moot and academic. There is no case or controversy within the meaning of Article III, Section 1, of the Constitution. The rule is, of course, well settled that the federal courts have no power "to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue * * *." (*California* v. *San Pablo Railroad Co.*, 149 U. S. 308, 314 (1893); *St. Pierre* v. *United States*, 319 U. S. 41, 42 (1943); *United States* v. *American Asiatic S. S. Co.*, 242 U. S. 537 (1917); *United States* v. *Alaska S. S. Co.*, 253 U. S. 113 (1920); *Public Utility Commissioners* v. *Compania Generale*, 249 U. S. 425 (1919); *United States* v. *Hamburg-American Co.*, 239 U. S. 466 (1916); *Heitmuller* v. *Stokes*, 256 U. S. 359 (1921); *Richardson* v. *McChesney*, 218 U. S. 487 (1910); *Brownlow* v. *Schwartz*, 261 U. S. 216 (1923); *Chesapeake Western Railway* v. *Jardine, Secretary*, 8 F. 2d 794 (App. D.C., 1925), cert. denied, 270 U. S. 653 (1926); *Taylor* v. *Austrian*, 154 F. 2d 107 (4th Cir., 1946); *Wingert* v. *Kieffer*, 29 F. 2d 59 (4th Cir., 1928).

Here, as previously noted, petitioner sued to enjoin the carrying out of a proposal dated August 30, 1949 made

by respondent Eastern States Corporation to the holders of its preferred stock for the voluntary tender of their shares for a limited period expiring September 30, 1949 for the purchase and retirement of the shares by the respondent Corporation (see Exhibit 1 to Original and Amended Complaint; 4a, 19a to 34a). During such period the holders of 27,464 shares out of 100,000 outstanding shares of preferred stock of respondent Eastern States Corporation were tendered for purchase and retirement. Shortly after September 30, 1949, all of the purchases were concluded (see Opinion of the District Court, 110a; see also respondents' (appellees') separate motion, dated January 9, 1950, to dismiss as moot the appeals in the Court of Appeals.). None of the tendering former holders of preferred stock, other than the respondents Plohn, Versfelt and Wattles (who were also directors of respondent Eastern States Corporation), were made parties to the suit. Thus no judgment, order, decree or other mandate of this Court or any other court, either by way of further affirmance or reversal, can affect in any respect the transactions which have passed beyond recall, and such judgments would be wholly ineffectual for want of a subject matter on which it could operate (*Brownlow* v. *Schwartz*, 261 U. S. 216, 217 (1923)).

The order of the District Court dismissing the suit was entered October 7, 1949 (92a). No stay of that order pending appeal was requested or granted by any court (cf. *St. Pierre* v. *United States, supra*).

In the "Supplemental Opinion" of the District Court it was said, among other things:

> "The matter was duly heard by the Court on October 7, 1949, on this state of the pleadings [that is after petitioner as plaintiff filed an amended complaint, defendant had answered and moved to

> dismiss the complaint] and the Court concluded that, in the course of the hearings on the defendant company's motion to dissolve the preliminary injunction, the Court was called upon fully to review and to adjudicate, and did fully review and adjudicate every basic contention made by the plaintiff, as set forth in the Court's lengthy opinion herewith. Furthermore, between the rendition of this opinion and the issuance of the order in conformity therewith, and the holding of the hearing on the show cause order, the period within which, under the plan, holders of the preferred stock of defendant Corporation might tender their shares, had expired, that is, on September 30th, and has never been extended although it could be by vote of the Corporation's directors. Approximately 27,000 of the 100,000 shares of preferred stock, or about 27%, were exchanged. Thus any further proceedings with respect to questions raised under the plan would be futile because moot, * * *'' (*Brown* v. *Eastern States Corporation,* 86 F. Supp. 887, 896 (D. Maryland 1949)).

Thus when the appeals were taken to the Circuit Court of Appeals the case was moot and academic.

We believe the Court of Appeals erred in denying respondents' (appellees') motions in that court to dismiss the appeal as moot and that the grounds stated in the court's opinion for the denial of such motion are not valid. The court said:

> "We are not impressed by the argument that the case is rendered moot merely by reason of the fact that the exchanges have taken place. If there were a party before the court who had suffered as the result of the action which it was sought to enjoin, we have no doubt of the power and duty of this court to afford him relief upon a finding that he was entitled to an injunction for which he had applied. Cf. *South Carolina Public Service Au-*

thority v. *Securities and Exchange Commission,* 4 Cir. 170 F. 2d 948; Chicago Junction Case, 264 U. S. 258, 267. Surely this court is not less able to grant relief when reviewing a court than when reviewing an administrative agency * * *" (*Brown* v. *Eastern States Corporation,* 181 F. 2d 26, 30 (4th Cir. 1950)).

The Court of Appeals overlooked the fact that in reviewing an order of an administrative agency, as was the case in *South Carolina Public Service Authority* v. *Securities and Exchange Commission* and the *Chicago Junction* case (*Baltimore & Ohio Railroad Company, et al.* v. *United States, Interstate Commerce Commission, et al.*), *supra,* the review by the Court of Appeals is an integral part of the total administrative process prescribed by the statute, and any action pursuant to an order of an administrative agency prior to the expiration of the period in which the order may be reviewed is taken at the risk that upon such review the order of the administrative agency may be "modified or be set aside in whole or in part" (Cf. Securities Act of 1933 (15 U.S.C.A. Sec. 77i) and Investment Company Act of 1940 (15 U.S.C.A. Sec. 80a-42)). An appeal from an order, judgment or decree of the District Court, on the other hand, is of course governed by the provisions of the Judiciary Law (28 U.S.C.A. Sec. 1291).

Where, as here, no stay was obtained of either of the orders of the District Court (1) vacating and setting aside the *ex parte* injunction obtained in the State Court and (2) dismissing the suit on the ground that all issues therein had been adjudicated, there was, of course, nothing to prevent respondent Eastern States Corporation from completing the carrying out of the plan of exchange of August 30, 1949, which was done (Cf. *St. Pierre* v.

United States, supra; Taylor v. *Austrian, supra*). When the appeals from the orders reached the Court of Appeals there was no longer any matter in controversy upon which the processes of the court could have any effect, either by way of reversal or affirmance. The Court of Appeals should, therefore, have dismissed the appeals as moot. For the reasons stated in the court's opinion it declined to do so and on consideration of the appeals it concluded that the order of the District Court dismissing the suit should be affirmed (see Order of the Court of Appeals entered April 4, 1950; 299).

We respectfully submit that despite the error of the Court of Appeals, this Court should apply the proper rule and hold with the District Court that the case is moot.

POINT II

The District Court properly denied petitioner's (plaintiff's) motion to remand the suit to the State Court because the case involved a federal question.

The principal argument advanced by petitioner for the granting of the writ of certiorari is that after an amendment of the complaint (made while the case was pending in the District Court and pursuant to the provisions of the Federal Rules of Civil Procedure providing for amendment) in which, it is claimed, all reference to alleged violations of federal statutes were eliminated, it was error for the District Court to deny petitioner's motion to remand the case to the State Court.

In such argument petitioner concedes, as is the fact, that at time of removal the suit was one arising under federal law of which the District Court clearly had valid jurisdiction (28 U.S.C.A. Sec. 1441).

As we shall show later, the allegations in the amended complaint, even without express reference to federal

statutes, nevertheless charged violations of federal law, to wit: the provisions of the Investment Company Act of 1940 (15 U.S.C.A. Sec. 80a-33(b)).

On the denial of petitioner's motion to remand the case after amendment of the complaint, the District Court issued a lengthy and well reasoned "Oral Opinion" (111a) which has not been officially reported. In that opinion the Court carefully reviewed all of the provisions of the Judicial Code, including the provisions prior to and subsequent to the amendments of 1948 and 1949 (28 U.S.C.A., 1940 Ed., Secs. 71 and 80, and 28 U.S.C.A., 1950 Ed., Sec. 1447(c), as amended, including the amendment effected by the Act of May 24, 1949).

The new section 1447(c) regulating procedure after removal reads as follows:

> "(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case * * *."*

In the opinion of the Court of Appeals affirming the

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* The old superseded provision of the Code (28 U.S.C.A., 1940 edition, Sec. 80) provided:

> "If in any suit commenced in a district court or removed from a state court to a district court of the United States, it shall appear to the satisfaction of the said district court, at any time after such suit has been brought or removed thereto, that such suit does not really substantially involve a dispute or controversy properly within the jurisdiction of the said district court * * * the said district court shall proceed no further therein but shall dismiss the suit or remand it to the court from which it was removed, as justice may require * * *."

order dismissing the action, it was said (333, 181 F. 2d 26, at p. 28):

> "Grave questions both of law and fact would be presented by the appeal, if plaintiff were in position to urge them. We do not mean by this to intimate any doubt as to the jurisdiction of the court or as to the correctness of the order denying the motion to remand. The original complaint unquestionably asserted that rights of plaintiff under federal statutes had been invaded; and this was sufficient to vest jurisdiction in the federal courts. 15 USCA 80a-43; *Deckert* v. *Independence Shares Corp.*, 311 U. S. 282. Cf. *Steele* v. *L. & N. R. Co.*, 323 U. S. 192, 207. The case was properly removable, therefore, to the federal court. 28 USCA 1441(a). And the fact that plaintiff subsequently amended his complaint in an attempt to eliminate the federal question did not make remand proper. Under the provision of the old judicial code relating to remand, 28 USCA 80, there was some conflict in the decisions [citing the earlier decisions], but the revised code has used language which should remove all controversy and clearly establish the rule that the case is not to be remanded if it was properly removable upon the record as it stood at the time that the petition for removal was filed. 28 USCA, 1950 Revised Edition, sec. 1447(c)."

The decision of the Court of Appeals and the District Court (118a, 119a) that the status of the case as disclosed by the petitioner's complaint is controlling in the case of a removal and that subsequent events do not oust the District Court's jurisdiction is in accord with established principles enunciated by the Supreme Court in a number of decisions.

This Court has held that once the jurisdiction of the District Court has been properly acquired by removal,

jurisdiction cannot be subsequently defeated by an amendment to plaintiff's pleadings reducing the amount in controversy below the jurisdictional amount (*St. Paul Indemnity Co.* v. *Red Cab Co.*, 303 U. S. 283 (1938));* and in a suit properly begun in the District Court a change of citizenship of a party does not oust the jurisdiction (*St. Paul Indemnity Co.* v. *Red Cab Co., supra,* pp. 294, 295; *Morgan* v. *Morgan,* 2 Wheat. 290, 297 (1817); *Mullan* v. *Torrance,* 9 Wheat. 537 (1824); *Dunn* v. *Clarke,* 8 Pet. 1 (1834); *Clarke* v. *Mathewson,* 12 Pet. 164 (1838); *Tug River Coal & Salt Co.* v. *Brigel,* 86 Fed. 818 (6th Cir. 1898), affirming 73 Fed. 13 (C.C.D. Ky. 1896)). The same rule governs a suit originally brought in a state court and removed to a federal court (*St. Paul Indemnity Co.* v. *Red Cab Co., supra,* p. 295). Change of parties by substitution or by intervention does not oust the jurisdiction (*Phelps* v. *Oaks,* 117 U. S. 236 (1885); *Hardenbergh* v. *Ray,* 151 U. S. 112 (1893); *Wichita R. & Light Co.* v. *Public Utilities Commission,* 260 U. S. 48 (1922)).

The decision of the Court of Appeals is not in conflict with the decision of any other Court of Appeals. In *Southern Pacific Co.* v. *Haight,* 126 F. 2d 900, 903 (9th Cir. 1942), the court made it clear that:

> "Where a case has been properly removed jurisdiction over it will not be defeated by later changes or developments in the suit, such as changes in

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* The Court said (p. 290):

> "Moreover, the status of the case as disclosed by the plaintiff's complaint is controlling in the case of a removal, since the defendant must file his petition before the time for answer or forever lose his right to remove. * * * Thus events occurring subsequent to removal which reduce the amount recoverable, whether beyond the plaintiff's control or the result of his volition, do not oust the district court's jurisdiction once it has attached (p. 293)."

citizenship, in parties, in the amount involved or in the cause of action pleaded. *Pullman Co.* v. *Jenkins,* 305 U. S. 534, 59 S. Ct. 347, 83 L. Ed. 334; *Stewart* v. *Dunham,* 115 U. S. 61, 5 S. Ct. 1163, 29 L. Ed. 329; *Phelps* v. *Oaks,* 117 U. S. 236, 6 S. Ct. 714, 29 L. Ed. 888; *Daland* v. *Hewitt Soap Co.,* D. C., 27 F. Supp. 482."

Petitioner asserts that the construction placed upon the new remand statute by the lower court "is violative of Article III, Section 2, of the Constitution". But aside from such assertion and a quotation from the constitutional provision regarding the Judicial Powers of the United States, petitioner cites no decision of this Court in support of his argument; and the few cases that are cited in petitioner's brief (p. 25) as setting "the proper limits of the jurisdiction of the United States courts in removal and remand cases" are found upon examination to be cases in the District Courts and Circuit Courts of Appeals, and all of the cited cases are distinguishable on their facts, except *Solanics* v. *Republic Steel Corporation,* 34 F. Supp. 951 (N. D. Ohio, 1940) which was decided prior to the amendment of the remand statute.

Since the decisions of this Court construing the former remand statute in similar situations (*Pullman* v. *Jenkins, supra; St. Paul Indemnity Co.* v. *Red Cab Co., supra*) so far as we have been able to ascertain, it has never been urged in any of the decided cases that a denial by a District Court of a plaintiff's motion to remand, especially where the motion is predicated upon an amendment of the complaint filed pursuant to the Federal Rules of Civil Procedure while the action is pending in the federal court, constitutes a denial of a plaintiff's constitutional rights. Petitioner has not demonstrated how such denial can possibly invade constitutional rights or how peti-

tioner's voluntary action in amending a complaint in a suit then pending in a United States District Court can produce any "confusion" in the procedure for remand, as claimed by petitioner.

We respectfully submit that the petition here presents no valid jurisdictional or constitutional question requiring review by this Court.

POINT III

The amended complaint did not eliminate the federal question.

The gist of the allegations, not only of the original but also of the amended complaint, was that respondent Eastern States Corporation, a registered investment company, registered with the Securities and Exchange Commission under the Investment Company Act of 1940 (15 U.S.C.A., Sec. 80a-8), in its plan of August 30, 1949, offering the holders of its outstanding preferred stock the opportunity voluntarily to tender their shares for purchase or exchange for cash and other securities then held in the respondent Corporation's portfolio, made misleading and fraudulent statements.

The opportunity to tender the shares was made pursuant to the express provisions of the Investment Company Act of 1940 (15 U.S.C.A. Sec. 80a-23(c)) which reads as follows:

> "No registered closed-end company shall purchase any securities of any class of which it is the issuer except—
>
> * * *
>
> "(2) pursuant to tenders, after reasonable opportunity to submit tenders given to all holders of the securities of the class to be purchased; * * *."

Since the terms of the voluntary purchase plan included as part of the purchase price the delivery to the tendering stockholders of a substantial block of the securities of another corporation, i.e., shares of the common stock of St. Regis Paper Company, respondent Eastern States Corporation was required to file a registration statement in respect of the offer with the Securities and Exchange Commission pursuant to the Securities Act of 1933 (15 U.S.C.A. Sec. 78r). The registration statement included, among other things, all of the terms of the proposed voluntary tenders. Such registration statement (with the proposal of August 30, 1949) was carefully reviewed by the Securities and Exchange Commission, and, as the record shows, after numerous suggested changes in the text of the offer, the Commission, by an order dated August 1, 1949, permitted the registration statement to become effective (236a). A copy of the prospectus referring to such registration statement accompanied the proposal as sent to each holder of respondent's preferred stock (see Exhibit 1 to the Original Complaint and Amended Complaint, 19a to 34a, inclusive; par. 7 of the Original Complaint and the Amended Complaint, 48a and 58a).

In the original complaint as well as in the amended complaint it was alleged that the plan of August 30, 1949, "makes only an incomplete and partial disclosure of the true facts in connection with the plan and the true consequences to the parties of carrying it through, and, to the extent that the disclosure is only partial, is false, misleading and fraudulent." (See par. 18 of the Original Complaint, 9a; and see par. 15 of the Amended Complaint, 61a.) There was also the further allegation that "the plan in question is unfair to the class of preferred stockholders and * * * is unfair, fraudulent and misleading

to the holders of common stock as well." (See pars. 19 and 21 of the Original Complaint, 9a, 13a; pars. 16 and 18 of the Amended Complaint, 61a, 64a.) These allegations referred to a document which respondent Eastern States Corporation was required to file with the Securities and Exchange Commission pursuant to the provisions of the Investment Company Act of 1940 (15 U.S.C.A. Secs. 80a-23(c); 80a-33(b)). Petitioner's complaint therefore charged that in making the offer for the voluntary tender of shares of preferred stock of respondent Eastern States Corporation, respondent had violated the Investment Company Act of 1940 (15 U.S.C.A. Sec. 80a-33(b)), and possibly the Securities Act of 1933 (15 U.S.C.A. Sec. 78r).

Thus the amended complaint, by retaining all of the charges of the making of "false, misleading and fraudulent" statements in connection with the offer to exchange securities and merely omitting the numerous references to "federal statutes", and specifically "the Investment Company Act of 1940," which had been included in the original complaint (See, for example, pars. 16, 17, 18; 8a and 9a), nevertheless attempted to state a claim of liability under a federal statute.

The cause of action attempted to be stated in the amended complaint and the relief demanded was substantially the same as in the original complaint, and the District Court so held, saying (119a) as noted above:

> "* * * this Court is not convinced that even if the allegations of such reliance [upon a specifically mentioned federal statute] are completely deleted from the bill of complaint, the questions at issue can be properly adjudicated without giving consideration to the conduct of the defendant company as regulated by the Securities and Exchange Commission

> under the Investment Company Act of 1940 and also the Securities Act of 1933, * * *."

Jurisdiction of the United States District Court over private suits to enforce liabilities created by the Investment Company Act of 1940 is conferred by the provision of that act (15 U.S.C.A. Sec. 80a-43) which grants the District Courts of the United States concurrently with state (and territorial) courts jurisdiction of all suits in equity and actions of law brought to enforce any liability or duty created by or to enjoin any violation of that act or the rules and regulations or orders thereunder; and the Securities Act of 1933 confers similar jurisdiction upon the United States District Courts concurrently with the state courts, but that Act includes a clause which is not in the Investment Company Act of 1940, providing that suits brought in a state court of competent jurisdiction to enforce a liability under the Securities Act of 1933 shall not be removed to any court of the United States (15 U.S.C.A., Sec. 77v(a)).

There can be little room for doubt, therefore, that the allegations of the amended complaint attempted to state a cause of action under a law of the United States,—the Investment Company Act of 1940; that such action could have been commenced in the United States District Court for the District of Maryland; that the action, as one involving a federal statute (containing no prohibition against removal), was properly removed to the District Court; that despite the eliminations of the specific references to "federal statutes" in the amended complaint, the District Court continued to have jurisdiction of the suit and that, aside from the matters considered under Points I and II above, the District Court properly denied the petitioner's motion to remand.

CONCLUSION

The petition for the writ of certiorari should be denied.

Respectfully submitted,

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Dated: September 22, 1950.